88- 1739

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO._____

STANLEY CARL ORN, Petitioner
VS.
THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS THIRD SUPREME JUDICIAL DISTRICT

Law Office of Edward Martin Lavin, Jr.
By: Edward Martin Lavin, Jr.
8961 Tesoro Drive No. 302
San Antonio, Texas 78217
(512) 829-1938
State Bar No. 12000250
ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Does retroactive application by the Texas Courts of a judicial opinion declaring a state statute unconstitutional and void ab initio deny Petitioner, who properly and timely asserted his rights under the then existing statute, his liberty interest in violation of the due process guarantees of the Fifth and Fourteenth Ammendments of the Constitution of the United States?

TABLE OF CONTENTS

Opinions Below 2
Jurisdiction 2
Constitutional Provisions, Statutes
and Rules Invloved 3
Material Facts and Proper Raising of Questions
in Lower Courts 4
Reason for Granting the Writ 6
Argument and Authorities 7
Conclusion 10
Certificate 10
Appendix A 12
Appendix B 18

TABLE OF AUTHORITIES

Allen v. Hardy, 478 U.S. 255
(S.C., 1986) 8

Batson v. Kentucky. 476 U.S. 79
(S.C., 1986) 8

Lapasnick v. State, _____ S.W. 2d Not Yet Reported
(Tx. App., San Antonio, 1988 - Review Granted 1988,
Cr. App. No. 727-88) 9

Marks v. United States, 430 U.S. 188,
(S.C., 1977) 6

Meshell v. State, 739 S.W. 2d 246,
(Tx. Cr. App., 1987) 4,5,6,8,9

Stevenson v. State, 739 S.W. 2d 246,
(Tx. Cr. App., 1988) 6,7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO._____

STANLEY CARL ORN, Petitioner
VS.
THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS THIRD SUPREME JUDICIAL DISTRICT

The Petitioner, STANLEY CARL ORN, prays that a writ of certiori issue to review the opinion and judgement of the Court of Appeals for the Third Supreme Judicial District of Texas rendered in these proceedings on September 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas was not published, pursuant to Rule 90 (e), Texas Rules of Appellate Procedure. The opinion, however, appears at Appendix A.

In addition to the opinion Petitioner seeks to review by way of a writ of certiorari there were two other opinions issued by the Courts of the State of Texas in this cause, and they appear at Appendix B.

JURISDICTION

The judgement of the Court of Appeals For The Third Supreme Judicial District of Texas was rendered on September 21, 1988. Petitioner then timely filed a Petition For Discretionary Review on October 21, 1988, seeking to have the Texas Court of Criminal Appeals review the judgement and opinion of the Court of Appeals. Review by the Texas Court of Criminal Appeals was refused on December 21, 1988. Petitioner then filed a Motion For Rehearing on his Petition for Discretionary Review, which motion was filed with the Court of Criminal Appeals on January 5, 1989, and which motion was denied on January 25, 1989. These motions and orders and rulings appear at Appendix B. Jurisdiction to review said judgement herein by writ of certiorari is conferred on this Court by 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Constitution of the United States Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 32A.02, Section 1, Tx. C.C.P.: Time Limitations

Sec. 2. A court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within:

(1) 180 days of the commencement of a criminal action if the defendant is accused of a felony;

(2) 90 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable

by a sentence of imprisonment for more than 180 days; or

(3) 60 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less or punishable by a fine only.

Article 28.061, Tx. C.C.P.:
Discharge for Delay

If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial is sustained, the court shall discharge the defendant. A discharge under this article or Article 32.01 of this code is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute.

MATERIAL FACTS AND PROPER RAISING OF QUESTION IN LOWER COURT

Petitioner STANLEY CARL ORN was properly charged by complaint and information filed in the County Court-at-Law of Caldwell County, Texas with the misdemeanor offense of Driving While Intoxicated, Subsequent Offense. By timely motion Petitioner asserted his procedural right to discharge under the provisions of Article 32A.02, Tx. C.C.P., (The Texas Speedy Trial Act). A hearing was had at which time the trial court denied Petitioner's motion for discharge. The hearing in the trial court on Petitioner's Motion For Discharge under the provisions of Article 32A.02 took place on June 12, 1986, over one year prior to the decision of the Court of Criminal Appeals in **MESHELL V. STATE**, 739 S.W.2d 246 (Tx. Cr. App., 1987), and the State did not raise the **MESHELL** grounds in the trial court. Notice of appeal was given on July 17, 1986, and appeal was taken pursuant to the provisions of Article 44.02, Tx. C.C.P. It was on appeal that the State

raised, for the first time, the question of the constitutionality of Article 32A.02.

The Third Court of Appeals for the State of Texas sustained Petitioner's claim on the merits and ordered the prosecution dismissed under the provisions of Article 32A.02, Tx. C.C.P. **ORN V. STATE,** 724 S.W. 2d 764, (C.A., Austin, 1987). (This opinion found in Appendix B herein). The State filed a Motion for Rehearing in the Court of Appeals, which motion was denied, and then filed its Petition for Discretionary Review on May 5, 1987.

The State's Petition for Discretionary Review pended in the Court of Criminal Appeals until its opinion was issued on May 25, 1988. **ORN V. STATE,** 753 S.W. 2d 394, (Cr. App., 1988). In this opinion the Court of Criminal Appeals remanded the case to the Third Court of Appeals for "entry of judgement in accordance with Meshell." Petitioner filed a Motion For Rehearing on the State's Petition for Discretionary Review on June 8, 1988, which motion was denied by the Court of Criminal Appeals on June 22, 1988.

Under the mandate from the Court of Criminal Appeals the Third Court of Appeals affirmed the judgement in accordance with **MESHELL** by holding that the Texas Speedy Trial Act (Article 32A.02, Tx. C.C.P.) was unconstitutional and void ab initio and afforded Petitioner no right, remedy or relief. From this judgement Petitioner filed his Petition For Discretionary Review seeking to have the Court of Criminal Appeals review this case on the question of retroactive application of the **MESHELL** decision and its due process violations, which Petition was denied by the Court of Criminal Appeals on December 21, 1988 (Judge Teague Would Grant). Petitioner then filed his Motion for Rehearing with the Court of Criminal Appeals on January 5, 1989, and again sought review on basis of the due process violation occurring to Petitioner by reason of the retroactive application of the Meshell decision to Petitioner's case. Petitioner's Motion For Rehear-

ing was denied by the Court of Criminal Appeals on January 25, 1989.

REASON FOR GRANTING THE WRIT

The decision below, holding that the Texas Court of Criminal Appeals decision in **MESHELL V. STATE**, 739 S. W. 2d 246 (Tx. Cr. App., 1987) retroactively applies to Petitioner, decided the Federal Due Process question in a way in conflict with the decisions of this Court that retroactive applications of judicial decisions are inappropriate without substantial justification outweighing the ex post facto considerations.

ARGUMENT AND AUTHORITIES

The prohibition against ex post facto laws applies to legislative acts only and not to judicial acts, but the principle upon which the prohibition rests has been incorporated into the due process clauses of the Fifth and Fourteenth Amendments. **MARKS V. UNITED STATES**, 430 U.S. 188, 191-192 (1977).

The Texas Court of Criminal Appeals has held that the Texas Speedy Trial Act, Article 32A.02, Tx. C.C.P., was unconstitutional and void ab initio and cannot support any right, remedy or relief. **MESHELL.** However five Judges of the Court of Criminal Appeals have stated that the general rule that an unconstitutional law provides no right, remedy or relief is not absolute, and that the primary exception to that rule is when one acquires a right under such unconstitutional law before that law is declared unconstitutional. **STEVENSON V. STATE**, 751 S.W. 2d 508 (Tx. Cr. App. 1988). It was in the dissenting opinion in **STEVENSON** that Judges Teague, Duncan and Campbell stated that the acquisition of a substantial right is an exception to the general rule that an unconstitutional statute is void from its inception and provides no right,

remedy or relief. In a separate dissenting opinion in **STEVENSON** Judge Clinton stated that equitable rights acquired before declaration of unconstitutionality are not lost thereafter. In a concurring opinion in **STEVENSON** Judge Miller acknowledged that retroactive application of MESHELL could, in some circumstances, deprive a defendant of a substantial right and, in effect, amount to a violation of the ex post facto principles embodied in due process. **STEVENSON**, Id., 509.

The critical question, then, is whether or not Petitioner acquired a substantial right under the act prior to the declaration of unconstitutionality of the act. In this case, Petitioner acquired, under Article 28.061, Tx. C.C.P., a bar to prosecution if he obtained a dismissal of the charge under Article 32A.02. A bar to prosecution, while not being a defense to the charged crime, is, nevertheless, a defense available to a defendant at the time Petitioner asserted his rights under the act. In this case, Petitioner acquired, under Article 28.061, Tx. C.C.P., a bar to prosecution IF he obtained a dismissal under Article 32A.02. A bar to prosecution, while not being a defense to the charged crime, is, nevertheless, a defense available to a defendant at the time Petitioner asserted his rights under the Act.

There can be no doubt that the Petitioner absolutely relied on the law as it existed at the time he asserted his rights under the Act. Specifically, Petitioner timely filed his Motion For Discharge under the Act, obtained a pretrial hearing and obtained an adverse decision from the trial court. Thereafter, Petitioner waived his right to a jury trial, entered a plea of guilty with the stipulation that he could appeal the trial court's ruling and obtain review OF HIS CLAIM under Article 32A.02, Tx. C.C.P. Petitioner contends that, at the moment he gave notice of appeal, his rights under the Act became vested and cannot be taken away from him without the due process denial (both State and Federal Due Process rights) that Judge Miller addressed in his concurring opinion in **STEVENSON.** This

is particularly true because the State did not contend, at the trial level, that the Act was unconstitutional on any ground.

The question of retroactivity of a Court decision announcing or changing criminal procedure has been addressed by the United States Cupreme Court in **ALLEN V. HARDY**, 92 L.Ed. 2d 199 (1986). In that case, defendant was convicted prior to the decision in **BATSON V. KENTUCKY**, 90 L.Ed. 2d 69 (1986). The defendant, after conviction, attempted to retroactively apply the **BATSON** standard, and the Supreme Court refused to retroactively apply the new standard announced in **BATSON.** In the case at bar, it is the State attempting to retroactively apply the new standard of **MESHELL** after failing to assert the Meshell standard at trial, and for the same reasons as in **ALLEN V. HARDY**, the retroactive application of the new **MESHELL** standard should be denied.

The Supreme Court in **ALLEN V. HARDY**, announced the factors to be considered in determining whether or not to give retroactive effect to a new rule of criminal procedure. These factors are: (1) the purpose to be served by the new standard; (2) the extent of the reliance on the old standard; (3) the effect on the administration of justice of a retroactive application of the new standard. In considering these three factors, Petitioner concedes that the purpose to be served by the new standard is to do away with the time limitations of the Texas Speedy Trial Act, Article 32A.02, Tx. C.C.P. This purpose can be accomplished by making the decision in **MESHELL** prospective only.

Both prosecutors and the defense bar relied heavily on the Act prior to **MESHELL.** Prosecutors routinely filed announcements of "Ready" in compliance with the Act, and defense lawyers routinely waited and counted the days to see whether or not charging instruments were on file within the time limitations of the Act rather than re-

mind the prosecutor of the time limits by filing a motion of some type demanding a speedy trial in a case that was not yet filed in any court of record. In this particular case, Petitioner asserted his rights under the Act in a timely fashion and entered his plea on the agreement with the Court and the prosecutor that he could assert his claim under the Act on appeal and obtain review of his claim under the Act on appeal.

The third factor, that of the effect on the administration of justice of a retroactive application of the new standard is evident in the case of **LAPASNICK V. STATE,**_____ S.W. 2d _____ (Tx. App., San Antonio, 1988 - Review granted, 1988; CCA No. 727-88). In the **LAPASNICK** case, the defendant obtained a dismissal under the Act prior to its declaration of unconstitutionality, and the State has refiled the charge and seeks to prosecute the defendant, claiming that the defendant obtained no relief under the Act since it was void ab initio. The trial court agreed, and now that case is on appeal in the State Appellate Courts on the same question of retroactivity of the **MESHELL** decision. Retroactive application of **MESHELL** means that any and all criminal cases which were dismissed in the State of Texas pursuant to the provisions of Article 32A since its enactment, whether by a trial or Appellate Court, are equally void and may be refiled at the prosecutor's discretion. The reappearance of these hundreds of cases on the trial dockets of this State, along with their inevitable appeals, surely will have a devastating impact on the administration of justice in this State, much less the shaking of the public's confidence in the reliability of judicial decisions. In addition, the Federal Due Process questions raised by retroactive application of the **MESHELL** case will also impact the Federal Courts with collateral attacks of State Court convictions based on retroactive application of the **MESHELL** standard.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals For The Third Supreme Judicial District of Texas.

Law Office of Edward Martin Lavin, Jr.

By:_____

EDWARD MARTIN LAVIN, JR.
8961 Tesoro Dr., No. 302
San Antonio, Texas 78217
Ph: (512) 829-1938
State Bar No. 12000250
ATTORNEY FOR PETITIONER

CERTIFICATE

I hereby certify that three copies of the foregoing Petition For Writ of Certiorari have been duly hand delivered to counsel for the State of Texas, the Honorable Jeff Van Horn, Criminal District Attorney, Caldwell County Courthouse, Lockhart, Texas 78644; and the Attorney General of Texas at Austin, Texas this 24th day of April 1989.

_____

Edward Martin Lavin, Jr.
Attorney For Petitioner

APPENDIX A

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-86-198-CR

STANLEY CARL ORN,
APPELLANT

vs.

THE STATE OF TEXAS,
APPELLEE

FROM THE COUNTY COURT
OF CALDWELL COUNTY
NO. 17,100,
HONORABLE E. P. SLATER, JUDGE

ON REMAND

Appellant was charged by complaint and information in the county court with the offense of driving while intoxicated, second offense. Tex. Rev. Civ. Stat. Ann. art. 6701l-1(d) (Supp. 1988). Appellant was found guilty by the court upon his plea of guilty to the offense as charged, and his punishment was assessed at 180 days in the county jail and a $500.00 fine.

In his sole point of error, appellant complained that the trial court erred in overruling his pre-trial motion to dismiss the information for failure to comply with Tex. Code Cr. P. Ann. art. 32A.02 (Supp. 1987) ("Speedy Trial Act"). This Court sustained appellant's point of error and

reversed the judgment of the trial court, overruling the State's contention that the Speedy Trial Act violated the separation of powers doctrine set forth in the Texas Constitution Article II, () 1. See Orn v. State, 727 S.W.2d 764 (Tex. App. 1987). The Court of Criminal Appeals summarily granted the State's petition for discretionary review, vacated our judgment, and remanded the cause to this Court for reconsideration of appellant's complaint in light of Meshell v. State, 739 S.W.2d 246 (Tex. Cr. App. 1987); Orn v. State, 753 S.W.2d 394 (Tex. Cr. App. 1988).

The Court of Criminal Appeals held in MESHELL that by enacting the Speedy Trial Act the Legislature had violated the state constitutional doctrine of separation of powers; thus, the Court declared the Speedy Trial Act unconstitutional and void in its entirety. An unconstitutional statute is void from its inception and confers no benefits or rights. SEE Jefferson v. State, 75l S.W.2d 502 (Tex. Cr. App. 1988); Reyes v. State, 753 S.W.2d 382 (Tex. Cr. App. 1988).

Because the Speedy Trial Act was void from its inception and could not provide appellant a basis for any right or relief, appellant's point of error must necessarily be overruled and the judgment of the trial court affirmed.

We affirm the judgment of conviction.

(s) _____ Marilyn Aboussie, Justice

[Before Chief Justice Shannon, Justices Brady and Aboussie; Justice Brady not participating]
Affirmed
Filed: September 21, 1988
[Do Not Publish]

BEST AVAILABLE

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

December 21, 1988

RE: Case No. 1179-88
STYLE: Orn, Stanley Carl

COA#: 03-86-00198-CR

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.
JUDGE TEAGUE WOULD GRANT.

[15]

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO

Michael David Berg
434 South Main
Lockhard, TX 78644

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

January 25, 1989

RE: Case No. 1179-88
STYLE: Orn, Stanley Carl
COA#: 03-86-00198-CR

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Michael David Berg
434 South Main
Lockhard, TX 78644

AVAILABLE COPY

APPENDIX B

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AUSTIN

NO. 3-86-198-CR

STANLEY CARL ORN,

APPELLANT

vs.

THE STATE OF TEXAS

APPELLEE

FROM THE COUNTY COURT OF CALDWELL COUNTY
NO. 17,100, HONORABLE E. P. SLATER, JUDGE

Appellant was charged by complaint and information in the county court with the offense of driving while intoxicated, second offense. Tex. Rev. Civ. Stat. Ann. art. 6701l-1(d) (Supp. 1987). Appellant was found guilty by the court of the offense as charged and was assessed punishment at 180 days in jail and a $500 fine.

Pursuant to Tex. Code Cr. P. Ann. art. 44.02 (1979), appellant brings this appeal on the sole point that the court erred in overruling his motion to dismiss the information on the basis he had been denied his rights under the Speedy Trial Act, Tex. Code Cr. P. Ann. art. 32A.02 (Supp. 1987). We will sustain appellant's point of error and grant relief in accordance with this opinion.

Appellant was arrested December 5, 1985, for the offense of driving while intoxicated. On March 24, 1986, appellant was charged by complaint and information with the misdemeanor offense of driving while intoxicated, second offense. Appellant's motion to dismiss the charges against him on the basis the State had not complied with the provisions of art. 32A.02 was overruled.

Appellant contends that because more than ninety days elapsed between his arrest and the filing of the information, he was denied a speedy trial on his misdemeanor charge. Tex. Code Cr. P. Ann. art. 32A.02, § 1(2) (Supp.

1987). The State responds that the Speedy Trial Act is unconstitutional, that certain days should be excluded in computing the time, thus bringing the date of filing and State's announcement of ready within the provisions of the Act, and finally that the action did not commence until the information and complaint were filed.

The record reflects on its face that the information was not filed within 90 days of appellant's arrest. The State concedes that this would be a violation of the Speedy Trial Act, absent one of the excuses urged in its brief.

The State argues first that the Speedy Trial Act is unconstitutional, because it violates the separation of powers doctrine set out in Art. II, () 1 of the Texas Constitution, by permitting the Legislature to encroach upon the duties of the judicial officers concerned. The State cites no authority for this proposition, other than a thoughtful 1979 concurring opinion.[1] despite the fact that the Court of Criminal Appeals has addressed various provisions of the Act in numerous opinions. The State does not have unlimited discretion in prosecuting the accused. Criminal defendants are guaranteed a speedy public trial by the Sixth Amendment to the United States Constitution and by Article I, () 10 of the Texas Constitution. The Speedy Trial Act merely defines what may be considered reasonable delay.

The State further argues that certain periods of time should be excluded prior to the filing of the complaint and information, which would then bring the matter within the statute.[2]

[1]Concurring opinion of Judge Sam Houston Clinton in Ordunez v. Bean, 579 S.W.2d 911 (Tex. Cr. App. 1979).

[2]Tex. Code Cr. P. Ann. art. 32A.02 4(10) (Supp. 1987) provides that in computing the time by which the State must be ready for trial, reasonable periods of delay justified by exceptional circumstances can be excluded.

While the State argues that the delay was justified due to extensive investigation generally required in these cases to uncover and gather the evidence necessary to prove prior offenses, the facts are undisputed that in appellant's case, the prosecutor received a referral from the Department of Public Safety on December 11, 1985; that information on appellant's criminal record was not requested until January 6, 1986; that the "rap sheet" was received January 8, 1986; and that certified copies of the McLennan County conviction later alleged as his prior conviction were received by the prosecutor on January 10, 1986.

The State also argues that it was awaiting additional information before deciding the various offenses with which appellant could be charged. However, the evidence the prosecutor deemed necessary to charge appellant for the offense of which he was ultimately charged and convicted was within the prosecutor's control within 36 days from the date of the offense. This Court cannot be concerned on appeal with other charges which might have been filed, or with the State's prosecution procedures in general. While the State may not have had all the evidence it desired, it had evidence to charge and convict appellant of driving while intoxicated, second offense.

Since the State had within its control evidence sufficient to prosecute appellant, its argument necessarily implies that the State was attempting to obtain evidence outside its control which would permit the filing of other or more serious charges. It is a felony offense to drive while intoxicated, having two or more prior, final convictions. Tex. Rev. Civ. Stat. Ann. art. 6701l-1(e) (Supp. 1987). The prosecutor testified that he also had received certified copies of appellant's prior felony conviction in Travis County in his office by January 24, 1986, forty-two (42) days after appellant's arrest. The prosecutor indicated that he considered the Travis County felony conviction "usable as an enhancement" and admitted, "Why I did not allege it as such in this case, I do not know; because I certainly have on prior occasions." Whether or not legally sufficient, by

January 24, 1986, the State possessed evidence the prosecutor deemed sufficient to prosecute this appellant for the maximum offense with which he could be charged, but never was.

The appellant's "rap sheet" further reflected two DWI probations in 1973 and 1976, both Travis County misdemeanor charges. The State also requested that certified copies of these documents be mailed from the Travis County Clerk on two occasions, the last being January 16, but that the information was never received. It was this information the State asserts was necessary for its investigation and justified the delay in the charging process.

Even if true, the State admits these offenses could not have been used to elevate appellant's 1986 offense to felony status, unless a probation had been revoked and become a final conviction. Even if such had occurred, their purpose, if any, could only have been to charge appellant using different or additional prior offenses or to persuade on punishment in the event appellant were convicted of a new offense. The 1973 and 1976 Travis County misdemeanor charges, even if final convictions had resulted, were not necessary according to the prosecutor's testimony to charge appellant with felony DWI or any lesser offense. In other words, the State had evidence to charge appellant with DWI, second offense, as it later did, or to take the matter to the grand jury and attempt to obtain a felony indictment. Instead, the State elected to do neither.

The existence of a charging instrument is one element of the State's claim of preparedness. The State cannot be ready for trial until an indictment or information is filed upon which the State can announce ready. Kernahan v. State, 657 S.W.2d 433 (Tex. Cr. App. 1983); Pate v. State, 592 S.W.2d 620 (Tex. Cr. App. 1980). The Speedy Trial Act addresses itself to prosecutorial delay. Barfield v. State, 586 S.W.2d 538 (Tex. Cr. App. 1979). Since the charge was not filed until more than ninety days after ar-

rest, the State was not ready within the time required. Cases excluding reasonable periods of delay justified by exceptional circumstances fall mainly into categories involving court delays or other delays outside and beyond the control of the prosecutor. Lloyd v. State, 665 S.W.2d 472 (Tex. Cr. App. 1984).

In LLOYD, the State argued that the period while awaiting lab analysis of evidence should be excluded. The court held this evidence was within the control of the prosecutor, the State failed to charge the defendant based on the information it had available, and the excuses for delay were not exceptional. As in LLOYD, the State in the present case knew what evidence was available by the statutory deadline, and was in a position to decide whether to prosecute appellant and if so on what grounds.

The State complains that under the Act, the State cannot timely file a misdemeanor charge, announce ready for trial, and then proceed with a felony charge MORE than 120 days after the date of arrest. Luedke v. State, 711 S.W.2d 657 (Tex. Cr. App. 1986). While that is correct, the State can file a misdemeanor charge within 90 days, announce ready for trial, and then proceed to prosecute a felony charge WITHIN 120 days after arrest if its continued investigation so justifies. Tex. Code Cr. P. Ann. art. 32A.02, § 1 (1) (Supp. 1987). As observed by the Court in LLOYD, the prosecutor controls the investigation of cases, the presentation of cases to the grand jury, and which prior convictions to allege. The State seems to argue that DWI investigations are of such a different nature that they should be exempt from the Speedy Trial Act provisions or at least the investigative delay in these cases should be deemed reasonable and at the same time exceptional. In appellant's case, however, the State was not required to rely on the county clerk to furnish information but instead chose to do so rather than take affirmative measures to obtain the records itself. It is the exact delays described in LLOYD and present in appellant's case which the Act seeks to control.

Finally, the State argues that the Speedy Trial Act does not bar suit against appellant, because the action against him was not commenced until the charges were filed in court. The State's reliance on Luedke v. State, SUPRA, is misplaced.

In LUEDKE, the defendant was arrested and charged with misdemeanor driving while intoxicated. He filed a speedy trial waiver. More than 120 days after his arrest, the State attempted to file a felony indictment, claiming the defendant's waiver applied to all possible charges against him.

Following its reasoning in Gant v. State, 606 S.W.2d 867 (Tex. Cr. App. 1980), the Court of Criminal Appeals held that each offense which can be charged is a separate offense requiring pleading and proof of different elements of guilt, not merely enhancement proof as to punishment. Speedy trial waiver as to the offense the State elected to charge, therefore, did not constitute a waiver as to another offense which could have been charged.

The State relies upon LUEDKE to support its proposition that appellant was arrested only for the offense of driving while intoxicated, since the officer at the scene had no knowledge whether prior convictions existed. Because he was never arrested for driving while intoxicated, subsequent offense, the arrest could not commence the action.

Texas Code Cr. P. Ann. art. 32A.02, () 2(a) (Supp. 1987) provides that a criminal act commences when the complaint and information are filed with the court, unless first the defendant is detained or released on bail "to answer for the same offense OR ANY OTHER OFFENSE ARISING OUT OF THE SAME TRANSACTION IN WHICH CASE THE ACTION COMMENCES AT THE TIME OF ARREST." (emphasis added). Consistent with the statute, the Court in LUEDKE held that while misdemeanor and felony acts of driving while intoxicated are separate of-

fenses with different elements for purposes of charge and proof of guilt, they are committed and arise out of the same transaction, so that one arrest commences the time for each for purposes of speedy trial. LUEDKE at 659.

Appellant is entitled to relief under the provisions of Tex. Code Dr. P. Ann. art. 32A.02 (Supp. 1987). The judgement of the trial court is reversed, the information is ordered dismissed, and appellant is discharged under the terms of the Speedy Trial Act. Tex. Code Cr. P. Ann. art. 28.061 (Supp. 1987).

Marilyn Aboussie, Justice

(Before Chief Justice Shannon, Justices Brady and Aboussie)
Reversed, Remanded and Information Ordered Dismissed
Filed: March 25, 1987
[Publish]

STANLEY CARL ORN, Appellant

NO. 466-87 v. ---------- Petition for Discretionary Review from the Third Court of Appeals [CALDWELL COUNTY]

THE STATE OF TEXAS, Apellee

Appellee

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted by the court for driving while intoxicated, second offense. Punishment was assessed at 180 days confinement and $500.00 fine. On appeal to the Austin Court of Appeals, appellant's conviction was reversed. ORN V. STATE, 727 S.W.2d 764 (Tex. App. -- Austin 1987). The State petitioned this Court for review of the court of appeals' holding that Art. 32A.02, V.A.C.C.P. (hereinafter the Speedy Trial Act), was constitutional.

In MESHELL V. STATE, 739 S.W.2d 246 (Tex. Dr. App. 1986), this Court held that the Speedy Trial Act was unconstitutional and void ab initio. Since the State raised the issue of the constitutionality of the Speedy Trial Act on appeal, we will summarily grant the State's petition and remand this case to the court of appeals for reconsideration of the issue in light of the MESHELL decision.

The judgement of the court of appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

DUNCAN, III, Judge

(Delivered May 25, 1988)
EN BANC
PUBLISH

STANLEY CARL ORN, Appellant
NO. 466-87 Vs.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review
from the Third Court of
Appeals (CALDWELL COUNTY)

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Appellant was charged by complaint and information with the offense of driving while intoxicated, second offense. See Article 6701l-1(d), V.A.C.S. Appellant was found guilty by the court upon his plea of guilty and his punishment was assessed at 180 days in the county jail and at a $500 fine.

On appeal appellant, in a sole point of error, complained that the trial court erred in overruling his pre-trial motion to dismiss the information under the Texas Speedy Trial Act (Article 32A.02, V.A.C.C.P.). The point of error was advanced pursuant to Article 44.02, V.A.C.C.P.

The Austin Court of Appeals sustained appellant's point of error and reversed the judgement of the trial court overruling, inter alia, the State's contention that the Speedy Trial Act was unconstitutional because it involved the separation of powers doctrine set forth in Article II, § 1, Texas Constitution. Orn v. State, 727 S.W.2d 764 (Tex. App.-Austin 1987).

In view of the ruling on the constitutionality of the statute the State filed its petition for discretionary review. We granted the State's petition to determine the correctness of the Court of Appeals' ruling. Texas Rules of Appellate Procedure, Rule 200(c)(2).
In Meshell v. State, 739 S.W.2d 246 (Tex.Cr.App.-1987) a majority of this Court declared the Speedy Trial Act un-

constitutional and void in its entirety. In Meshell this Court announced that by enacting the Speedy Trial Act the Legislature had violated the state constitutional doctrine of separation of powers. See Article II, () 1 of the Texas Constitution.

Only recently in considering State's petitions for discretionary review in light of MESHELL, we have held that the Speedy Trial Act was void from its inception and could not provide a basis for any right or relief. See Jefferson v. State, S.W.2d (Tex.Cr.App.No. 327-85, May 11, 1988); Reyes v. State, S.W.2d (Tex.Cr.App. No. 645-84, May 18, 1988). See 12 Tex.Jur.3d,Const.Law, () 41, p. 548; 16 Am.Jur.2d, Constitutional Law, () 256, p. 724. These authorities make clear that an unconstitutional criminal statute is void law ab initio and confers no benefits or rights, bestows no power on anyone and justifies no act performed under it. For other cases involving granted State's petitions for discretionary review where the same result was reached, see Stevenson v. State, S.W.2d (Tex. Cr. App. No. 928-85, May 25, 1988); Massey v. State, S.W.2d (Tex. Cr. App. No. 1111-86, May 25, 1988); Beddoe v. State, S.W.2d (Tex. Cr. App. No. 1118-85, May 25, 2988); Wright v. State, S.W.2d (Tex. Cr. App. No. 1217-85, May 25, 1988).

In each of these cases the judgement of the Court of Appeals was reversed and that of the trial court was affirmed except where other points of error remained to be considered. In this latter situation the cause was remanded to the Court of Appeals. And in cases involving appellants' petitions for discretionary review concerning the same question the judgments of the Court of Appeals and the trial court have been affirmed. See Chacon v. State, S.W.2d (Tex. Cr. App. No. 813-86, 1988); Taylor v. State, S.W.2d (Tex. Cr. App. No. 127-85, 1988).

Strangely, today, the majority turns aside from our recent actions, and simply remands the cause to the Court of Appeals in light of Meshell, and "for further proceedings

consistent with this opinion." This, despite the fact that this cause is not different from many of the cases cited.

Pray tell what is the Court of Appeals to do/ It will have no choice in light of MESHELL except to write another opinion rejecting appellant's point of error and affirming the judgment of the trial court citing JEFFERSON, REYES, etc. After a possible motion for rehearing the appellant could file a petition for discretionary review and the matter would be back before this Court and added to our backlog. Our staff and this Court would AGAIN be involved with the same question. Where is the judicial economy involved in the majority's action today? Why is the finality of this action delayed, and the cause kept in heavenly appellate orbit?

I would reverse the judgement of the Court of Appeals and affirm the judgment of the trial court. I vigorously dissent to the failure of the majority to dispose of this cause NOW.

ONION, Presiding Judge

Teague, J., joins this dissent.
(Delivered May 25, 1988)
En banc

Publish